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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D.R., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DANIEL R.,

Defendant and Appellant.

D061888

(Super. Ct. No. J515681E)

APPEAL from orders of the Superior Court of San Diego County, David B.

Oberholtzer, Judge. Reversed and remanded with directions.

Daniel R. appeals an order denying his request for custody of his son, D.R., under Welfare and Institutions Code section 388.¹ He also appeals an order terminating his parental rights under section 366.26. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Daniel R. and Holly A.² are the unmarried parents of D.R., who is now three years old. D.R. is Daniel's only child. Holly has four older children. Holly's three oldest children were removed from her custody in 2005 due to her history of substance abuse and domestic violence. Her fourth child, Adrian A., was removed from her care in January 2009 after Daniel and Holly had several violent confrontations. The juvenile court placed Adrian with his maternal grandmother, Marie N., and her partner, Annette K.

After D.R.'s birth in August 2009, the San Diego County Health and Human Services Agency (Agency) offered voluntary services to Daniel and Holly. In April 2010, the Agency initiated dependency proceedings on D.R.'s behalf after the parents engaged in several more incidents of domestic violence. The juvenile court issued restraining orders preventing the parents from contacting each other. After sustaining the section 300 petition, the court removed D.R. from parental custody, denied reunification services to Holly and ordered a plan of reunification services for Daniel.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Holly does not appeal.

D.R.'s paternal grandparents requested custody. The Agency placed D.R. with his maternal grandmother to promote D.R.'s relationship with his half brother Adrian.

Daniel had three hours of weekly supervised visits with D.R. The monitors at the visitation center, maternal grandmother Marie, and the social worker said Daniel displayed and initiated physical affection with D.R. He was attentive to D.R.'s needs, set appropriate limits for him, redirected his behavior and was appropriately concerned for his safety. On one occasion, Daniel cursed when D.R. spilled his juice.

Daniel made good progress with substance abuse treatment and maintained his sobriety. He had continued contact with Holly in violation of restraining orders. The social worker concluded that in view of Daniel's dishonesty about his relationship with Holly, he did not make progress in domestic violence treatment and therapy. In early August, Daniel tested positive for marijuana.

On August 2, Holly came to Daniel's residence and broke the side mirrors off his vehicle. On August 7, Marie brought D.R. to the park to visit Daniel. Holly arrived and argued with Daniel about his new girlfriend. Holly kicked Daniel in the groin and left. Daniel reported all three violations of the restraining order to law enforcement.³

At the 12-month review hearing on August 18, 2011, the court found that Daniel did not make substantive progress with his case plan, terminated reunification services and set a section 366.26 hearing.

³ Holly was arrested and incarcerated from September 2 to November 25, 2011. In March 2012, Holly was incarcerated on charges of vehicle theft, being under the influence of a controlled substance, violating a restraining order and contempt of court.

In January 2012, Daniel filed a section 388 petition asking the court to place D.R. with him under a plan of family maintenance services. Daniel alleged he had not had any contact with Holly since August 2011, had maintained his sobriety, and had established a strong bond with D.R. and could now provide a safe, stable and loving home for him.

A hearing on Daniel's section 388 petition, followed by the section 366.26 hearing, was held on April 23 and 26, 2012. The parties agreed that if Daniel did not prevail on his section 388 petition, the evidence presented at the section 388 hearing would be considered at the section 366.26 hearing and the parties would not present any new evidence or call any new witnesses. The court admitted the social worker's reports in evidence and heard testimony from Cynthia Hernandez, an investigator with Dependency Law Group, Holly, Daniel, Daniel's girlfriend G.R., paternal great-aunt Priscilla R., paternal grandfather Jose R. and maternal grandmother Marie.

The social worker reported that D.R. was placed with Marie and Annette on April 5, 2010. He was emotionally attached to them. D.R. recognized Daniel and was happy to see him. Daniel was appropriate with him. D.R. enjoyed being tickled and kissed by his father but resisted being held. He engaged with Daniel during visits and sought his attention. Daniel played with D.R. and was able to set limits with him. The social worker noted that at one visit, she had to encourage D.R. to go to his father. D.R. stood motionless staring at his father, who then walked over and picked him up. The social worker believed that D.R. had a stronger bond and attachment to his brother and caregivers than he did to his father.

Cynthia Hernandez, an investigator with Dependency Legal Group and a former protective services worker with the Agency, conducted a home evaluation of Daniel's home and found it to be safe and appropriate. Daniel lived with G.R. and her two children. G.R. testified that she and Daniel had lived together since October 2011. She did not have a substance abuse, criminal or child protective history.

Holly wanted Marie to adopt D.R. Holly testified she had sexual relations with Daniel on November 25, 2011, the day she was released from jail.

Daniel said he had shared equal parenting responsibilities during the first six months of D.R.'s life. He consistently visited D.R. after dependency proceedings were initiated. When D.R. saw him, D.R. would get a big smile. His face would light up and he would say, "Daddy." D.R. tried to make the visits last longer and said he did not want to leave. Daniel denied meeting Holly in November. He continued to attend 12-step meetings, had a sponsor and was on step 9. Daniel wanted to raise his son.

Daniel's aunt, Priscilla, had supervised twice-weekly visits between Daniel and D.R. since August 2011. Daniel never missed a visit. During visits, D.R. called Daniel "Daddy." Daniel was always appropriate with D.R. D.R. was sad at the end of the visits and tried to prolong them. He would keep asking Daniel for more hugs and kisses. After one visit ended, D.R. said, "I'm sad." Daniel was a good dad. He was attentive, loving and affectionate with D.R. and firm when D.R. needed to obey him. They had a strong bond.

Jose, D.R.'s paternal grandfather, testified that when Daniel and Holly were living together, Daniel cared for D.R. He held and fed him, changed his diapers, played with

him and made him smile and laugh. During Jose's visits with D.R., D.R. said "Where's my Daddy?" or "I miss my Daddy." Jose said the social worker's account of a visit in which D.R. was reluctant to go to his father was inaccurate. Jose was present at the visit. When the social worker released D.R.'s hand, D.R. immediately ran to Daniel.

Marie testified she and Annette had cared for D.R. for more than two years. They read to D.R. at least one hour a day, and often went to the park, beach or library. D.R. would be devastated if he were separated from Adrian. Marie acknowledged it was important for D.R. to continue to visit Daniel and his paternal grandparents.

The juvenile court characterized Jose's testimony as "highly believable" and Daniel's testimony as "mostly believable." The court discounted Marie's testimony as "too self-favorable." The court gave less weight to the social worker's reports, characterizing them as "advocacy" and stating, "I would like to see a report from an honest broker on good points and bad points, and these reports do not meet that criteria."

In evaluating the section 388 petition, the court found that Daniel's circumstances had changed. Daniel was sober and in a new relationship. The court viewed the domestic violence between Daniel and Holly as a symptom of that relationship, not as a symptom of Daniel's disposition. Daniel's visits with D.R. showed there was a close, parental bond between father and son. However, the court said D.R.'s relationship with his brother was determinative of his best interests. The evidence showed the brothers were more bonded to each other than they were to any other person. The court found that separating D.R. from his brother would be detrimental to D.R. and denied Daniel's request for custody.

Proceeding to the section 366.26 hearing, the court found that the benefits of adoption to D.R. outweighed the benefits of maintaining a relationship with his father. The court reasoned a plan of guardianship might substantially interfere with D.R.'s relationship with his brother, and the brothers needed the peace and confidence that comes from being permanent members of a family. The court terminated parental rights and designated Marie as D.R.'s prospective adoptive parent.

DISCUSSION

Daniel contends the juvenile court abused its discretion when it found that it was not in D.R.'s best interests to be returned to his care. Daniel argues D.R.'s relationship with his half brother should not have been dispositive on the issue of whether reunification was in D.R.'s best interests. He further argues the record supports his request for custody under *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*).⁴

A

Legal Principles and Standard of Review

Under section 388, a parent, interested person or the dependent child (generically, petitioner) may petition the court to change, modify or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petitioner

⁴ Daniel also contends the juvenile court erred when it determined the beneficial parent-child relationship exception did not apply and terminated parental rights. (§ 366.26, subd. (c)(1)(B)(i).) Because we reverse the order denying Daniel's section 388 petition, we need not address this issue. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416 ["In the chronology of these events, a fair hearing on the section 388 petition was a procedural predicate to proceeding to the section 366.26 hearing and disposition."]; *In re Lauren R.* (2007) 148 Cal.App.4th 841, 861 ["Because it is necessary to restore all parties to their prior positions, the orders terminating parental rights are also reversed."].)

requesting the modification has the burden to show a change of circumstances or new evidence, and that the proposed modification is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

After reunification services have been terminated, section 388 provides an " 'escape mechanism' " to termination of parental rights by allowing the court to consider a legitimate change in the parent's circumstances. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)). This procedural mechanism, viewed in the context of the dependency scheme as a whole, provides the parent due process while accommodating the child's right to stability and permanency. (*Id.* at p. 307.) At this point in a dependency proceeding, it is presumed that continued out-of-home care is in the child's best interests. (*Id.* at p. 310.) The parent may rebut that presumption by showing changed circumstances that would warrant further consideration of reunification. (*Ibid.*)

In determining whether reunification is in the child's best interests, the juvenile court should consider a number of factors, including: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Kimberly F., supra*, 56 Cal.App.4th at p. 532.) This list is not meant to be exhaustive. (*Ibid.*)

We review the grant or denial of a section 388 petition for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) While the abuse of discretion standard gives the court substantial latitude, "[t]he scope of discretion always resides in the

particular law being applied, i.e., in the 'legal principles governing the subject of [the] action' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

B

The Court Abused Its Discretion When It Focused on the Sibling Relationship to Determine the Parent's Request for Custody Under Section 388

In evaluating the evidence at the section 388 hearing, the juvenile court found there had been a legitimate change in Daniel's circumstances and that he had a close, parental bond with D.R. The court noted the lack of evidence about D.R.'s bonds with Marie and Annette, and stated: "But we do have testimony on the relationship between [D.R.] and his brother, and I think that relationship is the linchpin to this motion. The children have been through a fair amount. And from the description from the maternal grandmother, *and from my experiences, as well*, these two boys are more bonded with one another than they are with anybody. Caregiver, father, mother. ¶ And based upon that bond, as has been testified to, I cannot say that it would be in [D.R.]'s best interest to remove him from that relationship." (Italics added.)

The sibling relationship is not the determinative factor in assessing a parent's request for reunification at a section 388 hearing. A young child's needs for competent, caring and stable parenting is paramount, and in most cases will take precedence over the child's sibling relationships. (Cf. *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 950 [discussing the sibling relationship exception to termination of parental rights].)

Although a dependent child may have a close bond with a sibling, in most circumstances, the sibling will not be able to provide for the child's fundamental needs for food, shelter, clothing, supervision, education, guidance, and safety, stability and permanency. When a parent demonstrates a legitimate change of circumstances prior to a section 366.26 hearing, the court then determines which caregiver will best meet the child's needs for a permanent placement in a loving and safe home. (*Marilyn H.*, *supra*, 5 Cal.4th at pp. 307, 309; *In re L.Y.L.*, at p. 950; *Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530-532.)

Here, the juvenile court did not evaluate the strength of relative bonds between D.R. and *both* his father and caregivers, and assess their respective abilities to best meet D.R.'s current and future needs. Instead, the court abused its discretion when it improperly focused on the sibling relationship instead of applying the *Kimberly F.* factors to determine whether reunification was in D.R.'s best interests. (See *Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530-532.) In addition, we are troubled by the possibility the juvenile court inappropriately relied on its own experiences in determining the sibling bond was more important to D.R. than his respective bonds to his father and caregivers. We do not know if these personal experiences were related to judicial experience or personal life experiences.

Although the *Kimberly F.* factors are not meant to be exhaustive, the introduction of any nonlisted factors at a section 388 hearing must be weighed in view of the section 388 petition's function as an " 'escape mechanism' " to allow the parent to revive the reunification issue prior to a section 366.26 hearing. (*Marilyn H.*, *supra*, 5 Cal.4th at pp. 309, 306 [the dependency scheme comports with due process requirements in part

because section 388 allows a parent to protect his or her diminished but extant interests in the companionship, care, custody and management of his or her child].) At this stage of the dependency proceedings, elevating the importance of the sibling relationship over the parent-child or parent-caregiver relationship ignores the dependent child's needs for consistent parenting, permanency and stability, and may implicate the parent's due process rights. (*Ibid.*; see *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1422-1424 (*Luke M.*).)

This court's decision in *Luke M.* supports this interpretation. In that case, at the dispositional hearing, the juvenile court denied the request of a noncustodial, out-of-state father for placement of two of his four children on the grounds it would be detrimental to separate the siblings. (*Luke M., supra*, 107 Cal.App.4th at pp. 1418-1419.) This court held that the juvenile court could properly consider any factor that would cause the children to suffer detriment, including disruption of their sibling relationships, in determining the children's *temporary placement*. (*Id.* at p. 1423.) In rejecting the father's argument that using the children's sibling relationships to establish detriment violated his right to the care and custody of his children, this court stated its decision was limited to temporary placement decisions made at a dispositional hearing. (*Id.* at pp. 1423-1424.) The *Luke M.* court stated the temporary placement decision did not alter the father's status as a noncustodial parent, the juvenile court had concluded that reunification with the mother was in the children's best interests, and an out-of-state placement would hamper reunification efforts. (*Id.* at pp. 1422-1423.) In approving the juvenile court's assessment of the sibling relationship in a temporary placement order, the *Luke M.* court expressly

excluded the issue of the relative importance of the sibling relationship and the right to parent in the context of the noncustodial parent's request for custody after termination of reunification services. (*Id.* at p. 1424.)

We conclude that in the context of a request for reunification by a parent who has shown a legitimate change in circumstances, the juvenile court should place greater weight on the right to parent and the child's needs for competent, loving and stable *parenting* than on the child's sibling relationship. (*Marilyn H.*, *supra*, 5 Cal.4th at pp. 307, 309; *In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 950; *Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530-532.) Accordingly, we conclude that the juvenile court abused its discretion when it relied on the sibling relationship as the "linchpin" to deny Daniel's section 388 petition.

In their briefing, Daniel and the Agency spend considerable time discussing the application of the *Kimberly F.* factors in support of their positions. In view of the juvenile court's misapplication of the appropriate legal standard, we decline their requests to reexamine the record. It is not the function of the reviewing court to reweigh the evidence and make factual findings. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 [the trial court decides questions of fact, the appellate court decides questions of law].)

DISPOSITION

The order denying Daniel's section 388 petition is reversed. Because we reverse the order denying Daniel's section 388 petition, we necessarily reverse the order terminating Daniel's and Holly's parental rights. (*In re Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1416; *In re Lauren R.*, *supra*, 148 Cal.App.4th at p. 861; see, Cal. Rules of Court,

rule 5.725(a)(2) & (g); *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110.) The matter is remanded to the juvenile court to conduct a new hearing on Daniel's section 388 petition for reunification. Because we are unsure of the court's statement respecting its own experiences, we order the new hearing to be conducted before a different judge.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.